Alexander John Shek Kwok Bun v WAB Keluarga Realty Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–38 OF 2000(II)
ZAKARIA SAM JC
4 DECEMBER 2001

Civil Procedure *— Appeal — Right of appeal — Dismissal of application for summary judgment — Whether final order and appealable — Whether right to have case reheard conditional upon right to appeal — Meaning of 'decision' under s 29 of Courts of Judicature Act 1964 — Subordinate Courts Rules 1980 O 12 r 5(1) & O 26A — Courts of Judicature Act 1964 s 29*

On 14 May 1999, the plaintiff filed an action against the appellant/defendant ('the defendant') vide Sessions Court Case No 51–10–99(II) claiming against the defendant for increased tax of 10% and 5% respectively, amounting to RM76,095.15 with interests and costs. On 20 November 1999, the defendant took out a third party notice against the respondent, claiming contribution and/or indemnity from the respondent in respect of the plaintiff's claim. The respondent then filed and served its defence to the third party notice. On 23 December 1999, the defendant filed a notice of application under O 12 r 5(1) and O 26A of the Subordinate Courts Rules 1980 ('the SCR') for summary judgment to be signed against the respondent for the sum of RM75,924.61 with interests and costs. The respondent opposed this application. On 27 October 2000, the learned sessions court judge decided that there were triable issues and dismissed the defendant's notice of application with costs. The defendant appealed. At the hearing of the appeal, the plaintiff raised the preliminary objection that the decision of the sessions court judge was not a final order and therefore not appealable. The defendant argued that the present appeal was by way of rehearing and cited s 29 of the Courts of Judicature Act 1964 ('the CJA'), and also said that the matter was to be heard all over again before this court.

Held, upholding the respondent's preliminary objection and striking the appeal off with costs:

(1) Section 29 of the CJA stated the mode of hearing of an appeal, ie by way of rehearing. The rehearing could only be done through an appeal. The right to appeal was a pre-condition to the rehearing. Under no circumstances could the defendant come before this court to have the present application relitigated except by way of appeal. Therefore it was crucial for this court to firstly decide, whether or not the decision of the learned sessions court judge was appealable (see pp 573I–574A).

(2) The learned sessions court judge had ruled that there were triable issues in this matter and that this was not a proper and fit case for summary judgment. It was clear that her ruling did not fall under the meaning of 'decision' under s 3 of the CJA. In order to

A determine whether an order or decision was final, that order or decision must have determined the principal matter before the court thereby having concluded the main dispute and consequently, did not require further hearing or decision of the case to be made by the court on the whole of the proceedings. The dismissal of the defendant's application under O 26 of the SCR against the respondent did not finally dispose of the right of the defendant, and therefore was certainly not a proper matter for appeal (see pp 574B, H, 576B); *Tetuan J & S Holdings Sdn Bhd v A Karim bin Hassan* [2000] 6 MLJ 739 followed. In the absence of the right to appeal, the defendant had no locus standi to have his application for summary judgment to be reheard by this court (see p 576B).

[**Bahasa Malaysia summary**

Pada 14 Mei 1999, plaintif telah memfailkan satu tindakan terhadap perayu/defendan ('defendan') melalui Kes Mahkamah Sesyen No 51–10–99(II) menuntut terhadap defendan kenaikan cukai sebanyak 10% dan 5% masing-masing, berjumlah RM76,095.15 dengan faedah dan kos. Pada 20 November 1999, defendan mengeluarkan notis pihak ketiga terhadap responden, menuntut caruman dan/atau indemniti daripada responden berhubung tuntutan plaintif. Responden kemudiannya telah memfail dan menyampaikan pembelaannya ke atas notis pihak ketiga. Pada 23 Disember 1999, defendan telah memfailkan satu notis permohonan di bawah A 12 k 5(1) dan A 26A Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') untuk penghakiman terus terhadap responden bagi jumlah RM75,924.61 dengan faedah dan kos. Responden telah membangkang permohonan ini. Pada 27 Oktober 2000, hakim mahkamah sesyen memutuskan bahawa terdapat persoalan yang perlu dibicarakan dan menolak notis permohonan defendan dengan kos. Defendan telah membuat rayuan. Semasa rayuan dibicarakan, plaintif telah menimbulkan bantahan awal bahawa keputusan hakim mahkamah sesyen bukan satu perintah muktamad dan oleh itu tidak boleh dibuat rayuan. Defendan menghujahkan bahawa rayuan sekarang ini adalah melalui perbicaraan semula dan menggunakan s 29 Akta Kehakiman Mahkamah 1964 ('AKM'), dan juga mengatakan bahawa perkara tersebut perlu didengar semula di hadapan mahkamah.

Diputuskan, mengekalkan bantahan awal responden dan membatalkan rayuan dengan kos:

(1) Seksyen 29 AKM menyatakan cara perbicaraan rayuan, iaitu melalui perbicaraan semula. Perbicaraan semula hanya boleh dilakukan melalui satu rayuan. Hak untuk membuat rayuan adalah satu pra-syarat untuk perbicaraan semula. Defendan tidak boleh dalam apa keadaan pun menghadap ke mahkamah untuk mengemukakan permohonan sekarang yang dilitigasikan semula

kecuali melalui rayuan. Oleh itu adalah penting untuk mahkamah ini terlebih dahulu memutuskan, sama ada atau tidak keputusan hakim mahkamah sesyen yang arif boleh dirayukan (lihat ms 573I–574A). A

(2) Hakim mahkamah sesyen yang arif telah memutuskan bahawa terdapat persoalan-persoalan yang perlu dibicarakan dalam perkara ini dan bahawa ia bukan satu kes yang betul dan sesuai untuk penghakiman terus. Adalah jelas bahawa keputusan beliau tidak jatuh di bawah maksud 'keputusan' di bawah s 3 AKM. Bagi tujuan menentukan sama ada satu perintah atau keputusan adalah muktamad, perintah atau keputusan tersebut mestilah telah menentukan perkara yang utama yang dihadapkan ke mahkamah yang kemudiannya telah memutuskan pertikaian yang utama tersebut dan oleh demikian, tidak memerlukan perbicaraan atau keputusan selanjutnya tentang kes tersebut dibuat oleh mahkamah melalui prosiding yang menyeluruh. Penolakan permohonan defendan di bahawa A 26 KMR terhadap responden tidak meluputkan hak defendan sepenuhnya, dan oleh itu memang bukan satu perkara yang betul untuk dirayukan (lihat ms 574B, H, 576B); *Tetuan J & S Holdings Sdn Bhd v A Karim bin Hassan* [2000] 6 MLJ 739 diikut. Dengan ketiadaan hak untuk membuat rayuan, defendan tiada locus standi untuk permohonan beliau bagi penghakiman terus didengar semula oleh mahkamah (lihat ms 576B).] B C D E

Notes

For cases on right of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1177–1185. F

Cases referred to

Bozson v Altrincham [1903] 1 KB 547 (refd)
Dato' Seri Anwar Ibrahim v PP [1999] 1 MLJ 321 (refd)
Ismail bin Abdul Hamid v OSK & Partners Sdn Bhd [1996] 3 MLJ 686 (refd) G
Kee Yeh Maritime Co Ltd v Coastal Shipping Sdn Bhd [2001] 5 CLJ 194 (refd)
Kwong Yik Bank Bhd v Ansonia Management Associates Sdn Bhd [1999] 1 MLJ 366 (refd)
Ratnam v Cumarasamy & Anor [1962] MLJ 330 (refd) H
Subran @ Subramaniam a/l Kunhikuttan v Aladath Putham Veetal Moidutty [1997] 3 MLJ 342 (refd)
Tetuan J & S Holdings Sdn Bhd v A Karim bin Hassan [2000] 6 MLJ 739 (folld)
Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd [1999] 2 MLJ 696 (refd) I
Vong Ban Hin v Laksamana Realty Sdn Bhd [1996] 3 AMR 4054 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 28(1), 29, 50(2), 67(1)
Subordinate Courts Rules 1980 O 12 r 5(1), O 26A, O 46 r 6

John Shek (*John Shek & Co*) for the appellant/defendant.
Chan Kay Poh (*Chan & Chan*) for the third party/respondent.

Zakaria Sam JC: On 14 May 1999, the plaintiff (the Government of Malaysia) filed an action against the appellant/defendant ('the defendant') vide Sessions Court Case No 51–10–99(II) claiming against the defendant for increased tax of 10% and 5% respectively, amounting to RM76,095.15, together with interests and costs.

On 20 November 1999, the defendant took out a third party notice against the respondent, claiming contribution and/or indemnity from the respondent in respect of the plaintiff's claim. On 27 December 1999, the respondent filed and served its defence to the third party notice.

On 23 December 1999, the defendant filed a notice of application under O 12 r 5(1) and O 26A of the Subordinate Courts Rules 1980 ('the SCR'), for summary judgment to be signed against the respondent for the sum RM75,924.61 only with interests and costs. The respondent opposed this application.

On 27 October 2000, the learned sessions court judge decided that there were triable issues and dismissed the defendant's notice of application with costs.

Being dissatisfied with the decision of the learned sessions court judge, the defendant appealed.

At the hearing of the appeal, the plaintiff raised a preliminary objection in that that the decision of the learned sessions court judge is not a final order and therefore not appealable.

In reply, the learned counsel for the defendant argued that the present appeal before this court is by way of rehearing. He cited s 29 of the Courts of Judicature Act 1964 ('the CJA') to support his argument. He claimed that the preliminary objection raised by the respondent is a tactic by the respondent to delay the hearing of this appeal.

The learned counsel for the defendant further explained that since this appeal is by way of rehearing, the matter is to be heard all over again before this court. Therefore, the issue whether the decision of the learned sessions court judge is appealable or not does not arise. With due respect, I find that there is no merit in this argument. Section 29 CJA provides:

> All civil appeals from a subordinate court shall be by way of re-hearing, and the High Court shall have the like powers and jurisdictions on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court.

The abovesaid provisions spell out the mode of hearing of an appeal, ie by way of rehearing. The rehearing could only be done through an appeal. The right to appeal is a pre-condition to the rehearing. Under no circumstances

can the defendant come before this court to have the present application relitigated except by way of appeal. Therefore it is crucial for this court to firstly decide, whether or not the decision of the learned sessions court judge is appealable.

In order to do so, it is desirable for this court to hear the preliminary objection raised by the respondent, ie whether the defendant has the right to appeal against the decision of the learned sessions court judge, dismissing his application for summary judgment.

The learned sessions court judge had ruled that there were triable issues in this matter and that this was not a proper and fit case for summary judgment. It is clear that her ruling does not fall under the meaning of 'decision' under s 3 CJA. The amendment to the meaning of 'decision' (which was added by Amendment Act A1031 of 1998 and came into force on 31 July 1998) was referred to by his Lordship NH Chan JCA in *Dato' Seri Anwar Ibrahim v PP* [1999] 1 MLJ 321, in the following passage at p 329:

> This new definition of 'decision', as in the amendment, does not include a judgment or order which does not deal with the final rights of the parties on the matters in dispute. In other words, what has been excluded from the meaning of the 'decision' is the type of judgments and orders which is termed 'interlocutory'.

His Lordship further said at p 330:

> Shortly stated, what the amendment means is that a judgment or order which does not deal with the final rights of the parties, but is made pendente lite, and gives no final decision on the matters in dispute, is not a 'decision' within the meaning of that word in the current version of s 3 of the Act, and therefore is not appealable.

Lord Alverstone in *Bozson v Altrincham* [1903] 1 KB 547 laid down the following test in deciding whether an order was interlocutory or final:

> Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then ... it ought to be treated as a final order; but if it does not, it is then ... an interlocutory order.

This test was adopted with approval by the Court of Appeal in *Ratnam v Cumarasamy & Anor* [1962] MLJ 330 and also followed in *Kee Yeh Maritime Co Ltd v Coastal Shipping Sdn Bhd* [2001] 5 CLJ 194.

In *Tetuan J & S Holdings Sdn Bhd v A Karim b Hassan* [2000] 6 MLJ 739, VT Singam JC was of the view that (at pp 747–748):

> In order to determine whether an order or decision is final, that order or decision must have determined the principal matter before the court thereby having concluded the main dispute and consequently, does not require further hearing or decision of the case to be made by the court on the whole of the proceedings. In other words, the order or decision should not have dealt with the final rights of the parties on the subject matter in dispute which means, it is not conclusive of the main suit. In such a situation, the order or decision is not appealable within the meaning of the word 'decision' as defined in s 3 of the Courts of Judicature Act 1964.

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> On the other hand, if the order or decision finally disposes of the principal matter or the subject matter in dispute thereby bringing a conclusion to the whole of the proceedings without further date of hearing, it is the view of this court that the order or decision in those circumstances is appealable.

I agree with his view.

B In the instant appeal, the decision by the learned sessions court judge in dismissing the defendant's application for summary judgment did not finally dispose of the defendant's right against the respondent. The main suit by the defendant against the respondent was still pending. As such, he still has the chance to prove his case against the respondent.

C The case of *Ismail bin Abdul Hamid v OSK & Partners Sdn Bhd* [1996] 3 MLJ 686 cited by the learned counsel for the defendant is not relevant here as the facts are distinguishable. In that case, summary judgment had been entered against the defendant. The defendant's right had finally been disposed of, therefore the right of appeal is available to him. Furthermore, the issue in that case is not the right of appeal but in which registry the D Notice of Appeal ought to be filed by the defendant.

The learned counsel for the defendant also cited the case of *Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd* [1999] 2 MLJ 696 where the Court of Appeal held that in civil appeals, the relevant provisions applicable would be that of s 67(1) of the CJA. As the word 'decision' is not E used in s 67(1) of the CJA, there is no compelling reason to refer to s 3 of the CJA for the meaning of the said word. The phrase 'from any judgment or order' is not to be confused with the meaning given to the word 'decision' in the current version of s 3 of the CJA. With due respect, the learned counsel for the defendant failed to differentiate between appeals from the High Court to the Court of Appeal and appeals from the Subordinate Court F to the High Court. The relevant provisions applicable here are s 28(1) of the CJA, which reads:

> Subject to any other written law no appeal shall lie to the High Court from a decision of the subordinate court in any civil cause or matter ...

It is clear that, as opposed to ss 67(1) and 28(1) of the CJA uses the word G 'decision'. Therefore, the authority in *Tycoon Realty* is not applicable to the facts of the present case. Though *Dato' Seri Anwar* is in reference to a criminal appeal, the findings of the Court of Appeal there are also applicable to civil appeals from the subordinate court to the High Court as both provisions, ie ss 5(2) and 2(1) CJA hinged on the word 'decision'.

H The case of *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 3 AMR 4054 cited by the learned counsel for the defendant, is also not relevant as it was based on the old O 46 r 6 of the SCR as amended by PU(A) 193 of 1993 which is in line with the old definition of the word 'decision'. However, O 49 r 6 of the SCR has now been substituted by PU(A) 343 of 2000 wef 7 June 2000 and the new definition of the word 'decision' in s 3 I of the CJA as amended (wef 31 July 1998), excludes appeals against interlocutory orders. For the same reason, the case of *Subran @ Subramaniam a/l Kunhikuttan v Aladath Putham Veetal Moidutty* [1997]

3 MLJ 342 and *Kwong Yik Bank Bhd v Ansonia Management Associates Sdn Bhd* [1999] 1 MLJ 366 are also not authorities for the current definition of the word 'decision'. A

Conclusion

In the present appeal, the dismissal of the defendant's application under O 26A of the SCR against the respondent did not finally dispose of the right of the defendant and therefore, in my opinion, certainly is not a proper matter for appeal. In the absence of the right to appeal, the defendant has no locus standi to have his application for summary judgment to be reheard by this court. B

The preliminary objection of the respondent is hereby upheld and the appeal is struck off with costs. C

Preliminary objection of the respondent upheld and appeal struck off with costs.

Reported by Chew Phye Aun D

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